

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of )  
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Reexamination of the Comparative )  
Standards for Noncommercial )  
Educational Applicants )

MM Docket No. 95-31

To: The Commission

**PETITION FOR RECONSIDERATION AND CLARIFICATION**

The University of Kansas (the "University"), by its attorneys, hereby requests the Commission to reconsider and clarify, in part, its Report and Order, FCC 00-120, released April 21, 2000, in this proceeding.<sup>1</sup> In particular, the University requests the Commission to:

(1) Clarify or reconsider new Section 73.7003(b)(2) of the rules with respect to the requirement that an applicant's governing documents must require the applicant to maintain the diversity characteristics that receive two points under the new comparative point system; and

(2) Adopt an alternative means for resolving mutually exclusive applications in certain unique circumstances where there are vacant and unapplied for reserved noncommercial channels available sufficient to accommodate the mutually exclusive applicants.

**BACKGROUND**

The University is a state-chartered educational institution. It was created by the Kansas state legislature in the 1860's. It is governed by a Board of Regents that was created in 1859

<sup>1</sup> Federal Register publication of the Report and Order occurred on June 8, 2000. 65 Fed. Reg. 36375. Because the 30th day after publication was Saturday, July 8, this Petition for Reconsideration and Clarification is timely filed on the next business day. See 47 C.F.R. Sec. 1.4(j).

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pursuant to the Kansas Constitution. The University's operation is, in part, governed by state statute. *See generally*, 76 Kansas Statutes Article 7, State Educational Institutions; Management Operation.

The University is the licensee of two noncommercial stations at Lawrence, Kansas: KANU(FM) and KJHK(FM). The stations have different formats, management, and employees. KANU provides primarily news, public affairs and classical music programming and is an NPR affiliate. KJHK provides somewhat less news and public affairs programming and rock and jazz music. The University also has translator stations which it uses to distribute its programming to areas of eastern Kansas that are unable to receive directly KANU or KJHK. It also has pending two applications for new noncommercial stations at Emporia and Olsburg, Kansas, both of which are mutually exclusive with other applications.<sup>2</sup>

In its Report and Order, the Commission adopted a new comparative point system for selecting among mutually exclusive applicants for new noncommercial stations. The point system has four primary criteria: established local applicant (three points), local diversity of ownership (two points), state-wide network (two points), and technical parameters (one or two points). The tie-breakers among applicants for full-power stations are first, the number of existing same-service stations attributable to an applicant, and second, the number of pending new and major change applications in the same service, both of which are based on the applicant's status at the time of application. If a tie remains unbroken the Commission will mandate a time sharing arrangement. *See* Section 73.7003. For mutually exclusive applications for noncommercial translator stations, the Commission will apply the same point system, and the

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<sup>2</sup> BPED-980406MB and BPED-990126MD, respectively.

first two tie-breakers (as applicable to other translator stations or applications). If a tie still exists the first filed applicant will prevail. *See* Section 74.1233(e)(3).<sup>3</sup>

### **CLARIFICATION OF THE LOCAL DIVERSITY CRITERION**

Under the local diversity criterion, the Commission will award two points to an applicant that has no attributable interests in any other broadcast station or authorized construction permit in the same service (*i.e.*, radio to radio and television to television) whose principal community (city grade) contour overlaps the applicant's proposed station, "if the applicant's own governing documents (e.g., by-laws, constitution, or their equivalent) require that such diversity be maintained." Section 73.7003(b)(2) (emphasis added). While both of the University's pending applications meet the no overlap requirement, its two licensed stations in Lawrence do overlap. The University is concerned that it cannot meet the rule's "governing document" requirement as written.

The Commission provided virtually no explanation of this requirement in the Report and Order (none is provided in the rule beyond identifying two examples). Although the Commission recognized that most applicants' governing documents probably lack the required language and it will therefore give them an opportunity to amend their documents and applications to conform to the new requirement, that is all it said. *See* Report and Order at paras. 78 and 91.<sup>4</sup>

The Commission provided no guidance or explanation as to how a public educational institution organized under a state's constitution or statutes which does not have traditional "governing documents," such as the University, could or would meet this requirement. The University does not have typical articles of incorporation, by-laws, or similar governing

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<sup>3</sup> This summary of the new comparative point system omits discussion of the Section 307(b) issue for full power applicants and proposed fill-in service for translator applicants, both of which are preliminary analyses undertaken before the point system is applied and may result in a tentative selectee without applying the point system.

<sup>4</sup> The Commission did indicate that it would delegate to its staff authority to issue public notices announcing the procedures to be used in this process. Report and Order at para. 91.

documents. Rather, the Kansas legislature adopted the University's Charter in the 1860's.<sup>5</sup> The state Constitution establishes the University's governing body, the Board of Regents.<sup>6</sup> Other state statutes define the University's status as an educational institution,<sup>7</sup> provide that the University is a separate state agency and state institution, controlled by and operated and managed under the Board of Regents' supervision,<sup>8</sup> designate the University's Chancellor as its Chief Executive Officer, whom the Board of Regents appoints,<sup>9</sup> and delegates administrative responsibility for the University to the Chancellor.<sup>10</sup> The University cannot simply amend the Kansas Constitution or statutes in a "vote by the organization's members" as the Commission suggests. See Report and Order at para. 78. Rather, any change in the University's "governing documents" would require an act of the state legislature. Such action is plainly not practical, assuming it is administratively feasible for such a narrow purpose. Nor would the University even know which "documents" required amending.

The Commission should therefore clarify how the governing document component of the local diversity criterion applies, in a realistic and practical manner, to state, local or other public institutions or entities which are established or created under state or local law. If such a clarification is not possible (as the University suspects may be the case), then the Commission should exempt such institutions and entities from the requirement. Unless the Commission clarifies or modifies the rule in such a manner its point system will unnecessarily discriminate

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<sup>5</sup> See Laws 1864, Chapter 105; cited in *State of Kansas v. City of Lawrence*, 79 Kan. 234 (1909). A copy of the Charter is attached hereto in an excerpt from the *Catalogue of the University of Kansas* (1866).

<sup>6</sup> Kansas Constitution, Article 6, Sections 2(b) and 3(b).

<sup>7</sup> 76 Kansas Statutes Annotated Section 711(a).

<sup>8</sup> 76 Kansas Statutes Annotated Section 712.

<sup>9</sup> 76 Kansas Statutes Annotated Section 714.

<sup>10</sup> 76 Kansas Statutes Annotated Section 725.

against state or local government entities and preclude them from qualifying for local diversity credit when no principal community overlap exists and there is no prospect for such overlap.<sup>11</sup> This in turn would raise significant due process questions.

The University agrees with the Commission that it is important for applicants to maintain the characteristics upon which a comparative selection is based. *See* Report and Order at para. 93. However, the governing document requirement is not a workable mechanism for doing so when applied to state or local government entities, including educational institutions that frequently are Commission licensees and applicants for new stations. One possible alternative is to require such applicants to certify in applications for which local diversity credit is sought that the applicant has no attributable interest in any existing stations with overlapping principal community contours and that it will not acquire any stations with overlapping principal community contours while the applicant is the licensee of the applied for station.<sup>12</sup> If the applicant/licensee later files an application which violates this certification, that application will be subject to dismissal unless the applicant is able to eliminate the overlap given its opportunity for one curative amendment under Section 73.3522(b) of the rules.

Such a certification process also would address a second problem with the governing document requirement: When an applicant has existing stations with overlapping principal community contours or pending applications with such overlap where diversity credit is not sought, and other applications with no overlap for which local diversity credit is sought. In that

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<sup>11</sup> A similar issue may exist with respect to the governing document requirement under the established local applicant criterion, *see* Section 73.7003(b)(1). However, because that criterion does not immediately impact the University it is not discussed further herein.

<sup>12</sup> The four-year holding period which the Commission adopted will assure that an applicant selected under the point system will hold a station for a meaningful period of time. *See* Report and Order at para. 93.

situation, any generic language in a licensee/applicant's governing documents would preclude the continued ownership of the overlapping stations or prosecution of overlapping applications where diversity credit is not sought. Thus, the governing document language would have to be location or application specific to permit the licensee/applicant to retain its existing stations and prosecute any overlapping applications. The Commission has not stated whether this would satisfy the governing document requirement. Nor may accommodating such different situations in an entity's governing documents, including unknown future applications, be practical or even possible depending on the nature of the applicant.

A certification process would avoid this problem and the issue of state or local government entities that lack traditional governing documents. It also is a process the Commission can easily monitor, minimizing administrative burdens and abuse.

#### **ALTERNATIVE SELECTION PROCEDURE**

The University believes that an alternative selection procedure exists that in limited situations will avoid the use of the new comparative point system and will allow the Commission to grant more than one mutually exclusive application. In particular, when there are two or more mutually exclusive applicants for a community (or different communities), and there are other vacant, unapplied for reserved channels which are not mutually exclusive and are sufficient to accommodate the mutually exclusive applicants, the Commission should allow one or more of the applicants to amend their application to specify the vacant channel(s). This alternative would eliminate the need to apply the point system in a limited number of cases, thereby reducing the burden on the applicants and Commission, and would expedite the authorization of multiple new noncommercial services to the public.

The alternative would work as follows: Assume there are two mutually exclusive applicants for a new full-power station on the same channel in a community (although it is not required that the applicants specify the same channel or community to be mutually exclusive). If there is a vacant reserved band channel that is unapplied for and available for use in the same community, then one of the applicants would be permitted to amend its application to specify that channel. Such an amendment would qualify as a minor change under Section 73.3573(e) of the rules (which would require an amendment to that rule) and would not be subject to competing applications. The Commission could then grant both applications. This alternative should apply to applications filed under the previous rules which were pending as of the adoption of the Report and Order, and were cut-off, either before or after the adoption of the Report and Order. It should also apply to applications filed during a window filing period under the new procedures adopted in the Report and Order.<sup>13</sup>

The Commission already uses a similar procedure for reserved band translator applications under Section 74.1233(e)(2) of the rules. Under that rule the Commission may stipulate the use of an alternate frequency for one of the mutually exclusive applicants as a means of resolving the mutual exclusivity. The Commission also employs a similar policy in the context of new channel allocation rule making proceedings for non-reserved band channels. In that context, if there are conflicting proposals for the use of non-reserved band channels, usually an FM channel or channels proposed for different communities, and if there is another non-reserved channel available, the Commission will allocate both channels to satisfy the stated

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<sup>13</sup> If an application was pending as of the adoption of the Report and Order but was not yet subject to an "A" cut-off notice under the previous filing procedures, it is still subject to mutually exclusive applications under the new window filing procedures adopted in the Report and Order. After the first window filing period ends, and assuming there are mutually exclusive applications, the alternative procedure described in the text would become available.

interest in providing new service. The Commission thereby eliminates the need to compare the competing allocation proposals to select the one that will better serve the public interest and at the same time provides for additional new service.

There is no reason the Commission cannot apply a similar policy to resolve mutually exclusive applications for new noncommercial stations in the reserved band. First, reserved band FM channels are not included in the FM Table of Allotments and are not first allocated as a prerequisite to filing an application. Rather, reserved band FM channels are allocated based on demand, *i.e.*, when an application is filed and then granted the channel is allocated to the applicant for community. Thus, for reserved band channels the application process takes the place of rule makings to allocate new channels. It also means that any person interested in filing an application on a vacant reserved band channel has had the opportunity to do so.

Second, the Commission's adoption of a window filing system for new and major change applications eliminated the previous cut-off procedures. Thus, the Commission no longer requires that an application for a new station be placed on a public notice which establishes a deadline for filing competing applications. This means that an amendment to a mutually exclusive application to specify an alternate reserved band channel could be classified as a minor amendment without adversely affecting any other party's ability to apply for that channel (since it has already had such an opportunity).

Third, it allows the authorization of additional new noncommercial service while reducing the Commission's administrative burden. As soon as applicants know they are mutually exclusive they can search for other vacant reserved band channels that might accommodate them. If such channels are available, the applicants can agree which one will amend its application to the alternate channel thereby eliminating any need for the Commission



to comparatively review the applications. The amendment could be part of a settlement agreement submitted for the Commission's approval under Section 73.3525 of the rules. If the applicants fail to recognize the availability of alternate channels or simply don't avail themselves of the opportunity, the Commission on its own could stipulate the use of the alternate channel similar to Section 74.1233(e)(2) of the rules.

The University does not expect that this alternative resolution procedure would come into play in that many mutually exclusive application situations because of the already intensive use of the reserved band. However, in those situations where it is available, it would provide an efficient alternate means of allowing applicants to resolve the mutual exclusivity between their applications while expediting new and additional noncommercial service to the public.

## **CONCLUSION**

The clarification or reconsideration of the Report and Order that the University requests herein is not extensive. However, absent clarification or reconsideration of the local diversity criterion, applicants that are public institutions or entities created by state or local governments will likely suffer a competitive and comparative disadvantage because of their inability to satisfy the governing document requirement. Such discrimination would raise significant due process issues that could ultimately result in the invalidation of the Commission's new point system. The Commission also needs to clarify or modify the requirement to accommodate applicants with existing stations or applications for which local diversity is not relevant, but with other applications for which such credit is sought.

Additionally, the proposed alternative resolution procedure would provide a limited, but significant, opportunity for the Commission to expedite the processing of applications for new noncommercial stations, reduce its administrative burden, and expedite the initiation of new and

additional noncommercial service to the public. It would initially be up to the applicants to determine if the alternate process is available, but if they fail to do so the Commission could either mandate the use of the alternate channel or apply the comparative point system.

Wherefore, for the foregoing reasons, the University of Kansas respectfully requests the Commission to clarify or reconsider its Report and Order as set forth herein.

Respectfully submitted,

**THE UNIVERSITY OF KANSAS**

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CATALOGUE

OF THE

University of Kansas,

WITH

OFFICERS AND STUDENTS,

AND

A GENERAL DESCRIPTION OF THE UNIVERSITY.

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LAWRENCE, KANSAS:  
TRIBUNE BOOK AND JOB PRINTING ESTABLISHMENT—JOHN SPEER.  
1886.

## THE ORIGIN OF THE UNIVERSITY.

From the act admitting the State of Kansas into the Union:

"That seventy-two sections of land shall be set apart and reserved for the use and support of a State University, to be selected by the Governor of said State, subject to the approval of the Commissioners of the General Land Office, and to be appropriated and applied in such a manner as the Legislature of said State may prescribe for the purposes aforesaid, but for no other purpose." Approved January 9, 1861.

## FROM THE CONSTITUTION.

SECTION 7. Provision shall be made by law for the establishment of some eligible and central point, of a State University for the promotion of Literature and the Arts and Sciences, including a Normal and Agricultural Department. All funds arising from the sale and rents of lands granted by the United States to the State for the support of a State University, and all other grants, donations or bequests, either by the State or by individuals for such purposes, shall remain a perpetual fund, to be called the "University Fund," the interest of which shall be appropriated to the support of a State University.

Sec. 8. No religious sect or sect shall ever control any part of the Common School or University Funds of the State.

## CHAPTER.

SECTION 1. There shall be established in this State, at or near the city of Lawrence, in the county of Douglas, on the grounds secured for that purpose, pursuant to the act entitled "An act to locate the State University," passed February 20, 1861, an institution of Learning, under the name of the University of Kansas.

Sec. 2. The object of the University shall be to provide the inhabitants of this State with the means of acquiring a thorough knowledge of the various branches of Literature, Science and the Arts.

Sec. 3. The Government of the University shall vest in a Board of Regents, to consist of a President and twelve members, who shall be appointed as hereinafter provided, and the State Superintendent of Public Instruction and Secretary of State shall also, during their respective terms of office, be ex-officio members of said Board. A majority of the Board shall constitute a quorum for the transaction of business.

Sec. 4. The members of the Board of Regents shall be appointed by the Governor of the State, by and with the advice and consent of the

Senate, two-thirds of the Senators concurring therein, and shall hold their offices respectively, except those appointed to the first Board, for the term of six years from the first Monday of September next ensuing their appointment, and until the appointment of a successor; provided, That not more than three of the Regents to be appointed shall be members of the same religious denomination. Immediately upon the passage of this act, it shall be the duty of the Governor to appoint the members of the first Board of Regents, four of whom he shall appoint for two, four for four, and four for six years, from the first day of September next, and every second year after the passage of this act, there shall be appointed as aforesaid, for the term of six years, four members of said Board, whose term of office shall commence on the first day of September after their appointment.

Sec. 6. Whenever [there] shall be a vacancy in the office of Regents of the University, from any cause whatever, it shall be the duty of the Governor to fill such office by appointment, and the person or persons so appointed shall continue in office until the close of the Legislature then next thereafter, and until others are appointed in their stead.

Sec. 6. The Regents of the University and their successors in office shall constitute a body corporate, with the name and style of the Regents of the University of Kansas, with the right, as such, of suing and being sued, of contracting and being contracted with, of making and using a common seal, and allowing the same at pleasure.

Sec. 7. The Regents shall appoint a Secretary, a Treasurer and a Librarian, who shall hold their respective offices during the pleasure of the Board. It shall be the duty of the Secretary to record all the proceedings of the Board, and carefully to preserve all its books and papers. The Treasurer shall keep a true and faithful account of all moneys received and paid out by him, and shall give such bonds for the faithful performance of the duties of his office as the Regents may require.

Sec. 8. The Regents shall have power, and it shall be their duty to enact laws for the government of the University, in which a Chancellor, who shall be, ex-officio, President of the Board of Regents, or whom whom the Board may appoint a President pro tem. They may also appoint the requisite number of Professors and Tutors, and such other officers as they may deem expedient; also determining the amount of their respective salaries.

Sec. 10. The University shall consist of six departments. First,

the Department of Science, Literature and the Arts; second, the Department of Law; third, the Department of Medicine; fourth, the Department of Theory and practice of Elementary Instruction; fifth, the Department of Agriculture; sixth, the Normal Department. The immediate government of the several Departments shall be entrusted to their respective Faculties, but the Regents shall have the power to regulate the course of instruction, and prescribe, under the advice of the professorships, the books and authorities to be used in the several Departments, and also to confer such degrees and grant such diplomas as are usually conferred and granted by other Universities.

Sec. 11. The Regents shall have power to remove any officer connected with the Institution, when in their judgment the interests require it.

Sec. 12. The fee of admission to the University shall never exceed ten dollars, and the charge for tuition in the first and fourth Departments shall never exceed in one year, to the residents of the State, thirty dollars; and as soon as the increase of the University Fund will permit, tuition in those Departments shall be without charge to all students in the same who are residents of the State.

Sec. 13. The Regents are authorized to expend such portion of the income of the University Fund and the fund now on hand as they may deem expedient, for the erection of suitable buildings and the purchase of apparatus, a library and cabinet of natural history: Provided, that before they make any purchase or proceed to the erection of such buildings, they shall submit a plan of the same to the Governor and Secretary of State, which shall be approved by them: And provided further, that before proceeding to erect said University building, or any part thereof, there shall be on hand and provided for, money sufficient to erect and complete an entire section or wing of said building, or a building entire of itself.

Sec. 14. The Regents shall make a report annually to the Legislature at its regular session, exhibiting the state and progress of the University in its several departments, the course of study, the number of professors and students, the amount of expenditures, and such other information as they may deem proper. Meetings of the Board may be called in such manner as the Regents may prescribe, and any seven of them, at a meeting regularly called, shall be a quorum for the transaction of business, and a less number may adjourn from time to time. No sectarian tenets or opinions shall be required to entitle any person to be admitted as a student in said University, and no such

tenets or opinions shall be required as a qualification for any person as Tutor or Professor of said University.

Sec. 15. Nothing herein contained shall be construed as involving the State in any expense in the organization of said University.

Sec. 16. This act to take effect on and after its passage.

Approved March 1, 1861.